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No. 848

In the Supreme Court of the United States

OCTOBER TERM, 1959

LUCKENBACH STEAMSHIP COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment entered on December 14, 1959, by a three judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing a complaint seeking (1) to compel the Interstate Commerce Commission to exercise its discretionary authority under section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), and to suspend the

[1] The district court's opinion is reported at 179 F. Supp. 605.

operation of new tariff schedules containing reduced rail rates on canned goods from the Pacific Coast to all transcontinental destinations generally located in that part of the United States east of Illinois and north of North Carolina; and (2) to direct the rail carrier defendants, parties to the rates, to refrain from monopolistic practices designed to drive appellant out of business. (J. St. 2a–3a.)

The reduced rail rates were filed with the Commission on or about September 16, 1959, and were scheduled to become effective on October 23, 1959. On October 12, 1959, Luckenbach Steamship Company, Inc., the appellant, filed a protest against the new rates with the Commission. In its protest, Luckenbach requested the Commission to investigate the lawfulness of the new rates and, pending investigation, to suspend them. The rail carriers replied on October 19, 1959. Thereafter the matter was referred for initial disposition to the Commission's Board of Suspension.[2] On October 20, 1959, the Board voted not to suspend the rates. Subsequently, on appeal to Appellate Division 2 of the Commission, an order was entered on October 22, 1959, instituting an investigation into the rates. (J. St. 23a–24a.) The Appellate Division, however, voted not to suspend the protested schedules. (J. St. 25a.)

Thereafter, the appellant, on October 22, 1959, instituted an action in the district court seeking to compel

[2] A Board of five employees of the Commission constituted pursuant to section 17(2) of the Interstate Commerce Act, 49 U.S.C. section 17(2), to take initial action on protests and requests for suspension of rates.

the Commission to suspend the rates under investigation and also to compel the rail carriers to refrain from engaging in monopolistic practices designed to drive it out of business.[3] The district court unanimously held that the refusal of the Commission to suspend the operation of a new rate was a matter within the Commission's discretion and, therefore, not judicially reviewable (J. St. 9a). A majority of the district court was also of the view that the charges made in the complaint that the railroads had filed the rates pursuant to a conspiracy violative of the antitrust laws were "so inextricably enmeshed" with the question of the legality of these charges under the provisions of the Interstate Commerce Act that the antitrust charges were within the court's jurisdiction, but that the Commission had primary jurisdiction (J. St. 16a). The same majority ruled that, in these circumstances, dismissal of the complaint, rather than retention of jurisdiction and reference of the antitrust phase of the complaint to an ordinary district court, was the preferable and appropriate procedure (*id.* 16a–17a).[4]

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[3] On the same date Judge Caleb M. Wright, over the objections of the present appellees, issued a temporary restraining order requiring the Commission to suspend the challenged rates, and the Commission, in compliance with the court order, thereupon entered an order suspending the assailed rates (J. St. 26a).

[4] On December 15, 1959, the day after the district court entered its judgment dismissing the complaint, it suspended the effectiveness of its decision to and including December 22, to enable the plaintiff to apply to this Court or to a Justice thereof "for any appropriate relief." On December 22, 1959, Mr. Justice Brennan denied the appellant's application for a stay of the judgment

Since the assailed rail rates were filed to become effective October 23, 1959, and since § 15(7) of the Act, 49 U.S.C. 15(17), gives the Commission power to suspend a "new" rate for a period not longer than "seven months beyond the time when it [the rate] would otherwise go into effect," the Commission's power of suspension will expire on May 23, 1960, thus rendering the matter moot.

ARGUMENT

1. Contrary to the allegation of the appellant (J. St. 6), there is no conflict of decision regarding the reviewability of the Commission's action in declining to suspend the operation of new rates. The cases cited by the appellant (J. St. 6, fn. 6) to support its allegation that the courts are divided on this question of reviewability are not applicable to the precise issue here. Thus, *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (N.D. Tex.), dismissed as moot, 352 U.S. 1028; *Long Island Rail Road Company* v. *United States*, 140 F. Supp. 823 (E.D.N.Y.); and *Dixie Carriers* v. *United States*, 143 F. Supp. 844 (S.D. Tex.), dismissed as moot, 355 U.S. 179, involved situations in which the plaintiffs challenged the validity of an order of the Commission *vacating* a prior order of suspension and sought *reinstatement* of the rate suspension orders. It is submitted that these cases do not support the reviewability of the order which is here in issue.

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below pending determination of its contemplated appeal to this Court. Following this action, the rail rates went into effect on January 9, 1960.

The appellant also cites *Seatrain Lines* v. *United States*, 168 F. Supp. 319 (S.D. N.Y.), and *Marine Transport Lines* v. *United States*, 173 F. Supp. 326 (D. D.C.). In these cases the district courts held invalid, for insufficient findings, orders of the Commission which granted certain rail carriers relief from the long and short-haul provisions of Section 4 of the Interstate Commerce Act, 49 U.S.C. 4. The district courts remanded the cases to the Commission and required that it suspend the operation of the challenged rates. Thus these cases also do not support the appellant's contention that the courts have reviewed the action of the Commission in declining to suspend rates. In this connection, the district court below accurately held (J. St. 8a) that:

> Since then [*M. C. Kiser Co.* v. *Central of Georgia Railway Co.* 236 Fed. 573, 576 (1916), affirmed, 239 Fed. 718] a span of approximately forty-three years, whenever the reviewability of denial of a rate suspension by the Commission has been the issue, the courts have refused review.

Apparently the appellant would base its appeal upon that portion of the opinion below (J. St. 6a) which holds unreviewable agency action which, by law, is committed to an agency's discretion "even for arbitrariness or abuse of discretion." However, the district court did not so characterize the Commission's action in the instant case, and there is no reason to assume that the Commission's action was, in fact, arbitrary and an abuse of its discretion.

It is submitted that the district court correctly concluded that (J. St. 9a):

> * * * The Act clearly contemplates, no hearing by the Commission before decision and requires no reason be given if it denies suspension. Review in this posture would, in effect, supersede agency functioning. * * * [t]he denial of a suspension of a rate by the Commission is by law committed to agency discretion and therefore not reviewable.

2. The appellant contends that the Commission has no jurisdiction over the antitrust charges made in its complaint, and that the district court therefore erred in referring these charges to the Commission (J. St. 9). The case, however, does not require resolution of this matter. While the district court expressed the opinion that the Commission, in determining the lawfulness of the new railroads' rates, would have to consider the complaint allegations as to "predatory practices" and "conspiratorial action" (J. St. 12a-15a), the judgment entered by the court does not remand the cause to the Commission for further proceedings; it merely dismisses the complaint (*id.* 21a). Under the judgment, the appellant is left free to bring an action under § 16 of the Clayton Act, 15 U.S.C. 26, to enjoin the railroads' alleged violation of the antitrust laws. It is also left free to bring an action under § 4 of the Clayton Act, 15 U.S.C. 15, for triple the damages caused by the railroads' alleged antitrust violations. Jurisdiction of such actions is vested in ordinary one-judge district courts, which are empowered to take evidence and make factual

determinations based thereon. Such actions are wholly outside the jurisdiction of specially constituted three-judge district courts, whose authority is limited to review of the validity of orders of the Interstate Commerce Commission, solely on the basis of the proceedings before the Commission.

Even if such a three-judge district court has discretionary power to transfer to a one-judge district court a portion of a complaint which attacks a Commission order,[5] outright dismissal of the complaint certainly is not an abuse of discretion. See *Far East Conference* v. *United States*, 342 U.S. 570, 577. The effect of dismissal is merely to require the plaintiff, if it wishes an adjudication of its antitrust claims, to initiate an independent Clayton Act suit. We therefore submit that the second and third questions presented by the appellant (J. St. 3) raise no substantial issue warranting review by this Court. We further suggest that there is no sound foundation for review of these questions by this Court since they are ancillary to the action to set aside a Commission order, which is about to become moot (see *supra*, p. 4).

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[5] See *Shippers' Car Supply Committee* v. *I.C.C.*, 160 F. Supp. 939, 943 (D. Oreg.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal presents no substantial question and that the judgment of the district court should be affirmed.*

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MAY 1960.

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* If the Court's action in this case is taken after May 23, 1960, when the case will become moot (see p. 4, *supra*), the judgment should be vacated and the case remanded to the district court with directions to dismiss the complaint. *Amarillo-Borger Express* v. *United States*, *supra*, 352 U.S. 1028; *A., T. & S.F. R. Co.* v. *Dixie Carriers*, 355 U.S. 179.

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On Appeal From the United States District Court, District of Delaware

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellee railroads, The Baltimore and Ohio Railroad Company, Chicago, Rock Island and Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company, The Pennsylvania Railroad Company, Reading Company, Southern Pacific Company, Toledo, Peoria & Western Railroad Company, Canners League of California, and Northwest Canners and Freezers Association, Inc., move that the judgment of the district court be affirmed on the ground that the appeal presents no substantial question warranting further argument.

STATEMENT

This is a direct appeal from an order entered December 14, 1959, by a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing a

complaint which sought to compel the Interstate Commerce Commission to suspend certain reduced rates proposed by the carriers to become effective October 23, 1959 (R. 332). These carriers proposed, on statutory notice, effective on that date, to reduce their all-rail commodity rates on canned or preserved foodstuffs from Pacific Coast origins to destinations in the East (R. A. 130, 131).* Any suspension granted would expire May 23, 1960, i.e. seven months after the rate was to become effective, 49 U.S.C.A. Sec. 15(7).

The proposed reduction originated at a meeting called by shippers in April, 1958 to consider the need for a rate readjustment (R. A. 106).

While the rate proposed, $1.74 per 100 pounds, was lower than the prior minimum rate of $1.94, it was to be effective only as to shipments of a higher minimum weight of 75,000 pounds per car as compared with 60,000 pounds under the $1.94 rate. (R. A. 132). Because of the requirement of a higher weight per car, the carriers' revenues on the traffic would not be adversely affected by the lower rate (R. A. 134, 135). The new rate was fully compensatory, since from San Francisco to New York, the principal eastern destination, it would, according to studies made, produce revenues at least 46% in excess of the cost of transporting the traffic (R. A. 134, 135).

Under the Commission's procedure, protests to the proposed reductions were filed with the Commission by appellant, by competing steamship companies, and by others, alleging probable loss of traffic as a result of the reductions (R. A. 174, et seq.). Replies to these protests, setting forth facts in support of the new rate,

* Record references prefixed "A" are to documents in the Interstate Commerce Commission record filed with this Court but bound separately from the District Court record and listed as Item No. 40.

were filed in behalf of the rail carriers and the shippers of the bulk[†] of the canned goods from the Pacific Coast and in the Northwest (R. A. 99 to 145). These protests and replies set forth the facts upon which the opponents and proponents of the new rate relied, and constitute the evidence in the case.* After consideration of such evidence, the Board of Suspension of the Commission declined to suspend the proposed rate of $1.74. An appeal was taken from this action, as permitted by the Commission's regulations, to Division 2 of the Commission. That Division, after consideration of the same evidence (all of which is before this Court), (R. Item No. 40) affirmed the action of the Board of Suspension in declining to suspend, but at the same time, as is often its practice, instituted an investigation into the reasonableness of the rates (Order of October 23, 1959, in Docket No. 33234, *Canned Goods—Pacific Coast to the East*, [R. A. 171]). Following the Commission's order instituting the investigation, hearings in the proceedings were held at San Francisco, California, on January 25 to 29, 1960, inclusive, and at Washington, D. C., on March 21 to 25, 1960, and April 4, 1960. The investigation has not yet been submitted, as appellant Luckenbach has during the last three weeks been pursuing discovery procedures which it requested of the Commission. Further hearings are therefore possible before the record before the Commission will be closed.

On application to the District Court, the District Judge entered a temporary restraining order on October 22, 1959, prohibiting the establishment of the proposed rate pending the hearing and decision of the

[†] The shippers supporting the new rate produce 80% of the total canned goods production on the Pacific Coast (R.A. 105, 106).

* General Rules of Practice, I.C.C., 49 C.F.R. 1.200

matter by a statutory three-judge court. That court, consisting of Court of Appeals Judge Biggs and District Judges Wright and Rodney, after full consideration and argument, by order entered December 14 1959, sustained the refusal of the Commission to suspend the rate and dismissed the complaint (R. 332), but stayed the effect of its order for a short period to enable the presentation to this Court of an application for a stay (R. 335). The latter application was denied by Mr. Justice Brennan on December 22, 1959. This appeal was taken from the District Court's order of December 14, 1959, and appellant's jurisdictional statement was filed on April 9, 1960, and copy received by appellees on April 11, 1960.

ARGUMENT

The Commission's refusal to exercise its power temporarily to suspend a reduced rate is not reviewable

It is well settled that the refusal of the Commission to exercise its discretionary power to suspend a reduced rate for a stated period is not a subject for judicial review. This Court has so held. Chief Justice Hughes, speaking for the Court in *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Company*, 281 U.S. 412, 429 (1930), said:

> "* * * Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, Sec. 15(7); 36 Stat. 552; 41 Stat. 486, 487. This power of suspension was entrusted to the Commission only. * * *"

A long line of decisions of the District Court are to the same effect. *Algoma Coal & Coke Co.* v. *United States, et al.*, 11 F. Supp. 487 (N.D. Ala. 1935); *M. C. Kisig Co.* v. *Central of Georgia Ry. Co.*, 236 Fed. 573 (S.D. Ga. 1916), (aff'd 239 F. 718); *Carlson* v. *United States*, 107 F. Supp. 398 (S.D. N.Y. 1952); *Manhattan Transit Co., Inc.* v. *United States, et al.*, 24 F. Supp. 174 (Mass. 1938), and cases there cited; *Coastwise Lines* v. *United States*, 157 F. Supp. 305 (N.D. Cal. 1957), *National Water Carriers Association* v. *United States*, 126 F. Supp. 87 (S.D. N.Y. 1954). Only recently (March 28, 1960) a three-judge District Court for the Northern District of Ohio, Eastern Division, in *Bison Steamship Corp.* v. *United States* (Civil Action No. 35783), after reviewing a number of authorities, held that the proposition that, in the absence of special circumstances, the Commission's refusal to suspend was not reviewable "is so overwhelming that any serious argument to the contrary would be legally implausible."

Appellant erroneously asserts in its jurisdictional statement (p. 5) that there is "a deep split" among three-judge courts on this question. It refers (p. 6, note 6) to several cases as being at variance with the rule set forth by us above. However, none of the cases cited by appellant, headed by *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (N.D. Tex. 1956), support its assertion, since none are holdings on the question at issue here, i.e., the reviewability of the *mere refusal to suspend* a new rate. *Amarillo-Borger, Long Island Rail Road Company* v. *United States*, 140 F. Supp. 823 (E.D. N.Y. 1956), and *Dixie Carriers* v. *United States*, 143 F. Supp. 844 (S.D. Tex. 1956), all dealt with appeals from *orders* by the Commission

reinstating a rate previously suspended. *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D. N.Y. 1958), involved a Commission order granting a Fourth Section application and permitting a reduced rate to go into effect. The Court merely held that where the rate was *concededly unlawful*, suspension could be directed. *Marine Transport Lines, Inc.* v. *United States*, 173 F. Supp. 326 (D.C. 1959), did not even consider the matter of the Commission's suspension powers but merely enjoined and annulled an order granting Fourth Section relief as improperly granted.

Such cases thus involve entirely different issues from that of mere refusal to exercise the temporary power to suspend a rate for seven months. In enacting Section 15(7) of the Interstate Commerce Act, Congress specifically committed to Commission discretion the right temporarily to suspend a rate. Where such action is so committed to agency discretion, the Administrative Procedure Act does not permit review (Adm. Proc. Act, Section 10, 5 U.S.C.A. Section 1009). *State of New Jersey* v. *United States*, 168 F. Supp. 324, 326 (N.J. 1958), affirmed *per curiam* 329 U.S. 27 (1959); *Panama Canal Company* v. *Grace Line, Inc.*, 356 U.S. 309 (1958). Preliminary agency action such as is involved here is reviewable only upon the review of final administrative action. *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492, 499 (1955).

The action is premature and for that reason judicial review is not proper at this time

As pointed out above, although the Commission declined to suspend the proposed rate, it issued an order directing that an investigation be held into the reason-

ableness of such rate. Hearings have been conducted and additional hearings may be held pursuant to that order, as set out above in this motion. At such hearings, evidence concerning all issues pertinent to the establishment of the new rate may be introduced, including evidence relating to the appellant's antitrust allegations. When such administrative proceedings are completed and a decision rendered, any party dissatisfied with the decision of the Commission may then seek judicial review of that action. Until that time, any such review by the courts is premature.

If, on the basis of the full hearings in its investigation of the rate, the Commission should find the rate to be unreasonable, any necessity for appellant's application to this Court for relief would be eliminated. This Court only recently had an analogous situation before it, and dismissed the appeal as premature. In the litigation growing out of the Commission's *per diem* decision, *Boston & Maine Railroad Co.* v. *United States*, 358 U.S. 68 (1958), the Court said:

> "In its memorandum before this Court, the Commission has expressed its readiness to 'proceed in accordance with the terms of the remand.' As a result we find the question raised by No. 310—whether the Commission has adjudicatory jurisdiction to determine a rate of uniform application throughout the industry or must engage in what the District Court characterized as the 'full scale investigation' accompanying promulgation of a rule under Section 1(14)(a)—prematurely presented for decision. The Commission here recognizes that 'further investigation' and 'more detailed findings' will be requisite to compliance with the District Court's remand. Should such proceedings lead the Commission to reconsider its estimate of the desirability of a *per diem* embrac-

ing a mileage factor, the result might well be not a declaration that the present *per diem* is just and reasonable but the establishment of a new rate. If, conversely, the Commission adheres to its original view, it will be in the light of new findings derived from its further investigation. In either event, the proceedings on remand may lose the characteristics of a Section 5(d) declaration and take on those of a Section 1(14)(a) rule-making procedure, thereby causing the question now sought to be reviewed to disappear. As the Commission has appropriately observed, the record now presents what is essentially only 'an interim ruling.'

"These considerations lead us to dismiss the appeal in No. 310 without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings."

Until the Commission, in the investigation it has ordered, has heard all the evidence and made a decision, it has entered no order such as would be subject to review by this Court. The mere refusal to exercise its discretionary power temporarily to suspend the rate pending investigation is not an order subject to review. In *Carlsen, et al.* v. *United States, et al.*, 107 F. Supp. 398 (D.C. S.D. N.Y.), a three-judge statutory court said:

"Whenever a new schedule is filed, the Interstate Commerce Commission, pending a hearing and decision by it as to the reasonableness of the new rates, may suspend the operation of the schedule for a period not exceeding seven months beyond the time the schedule otherwise would have become effective.

"In the instant case, following the filing of new rate schedules by four interstate bus carriers, the plaintiff filed with the Interstate Commerce Commission a protest to the schedules and re-

quested the Commission to suspend the proposed rates pending a determination of their reasonableness. The Commission decided against suspension, and, treating the protest as a formal complaint, set the matter down for hearing and decision. Plaintiff now seeks an order of this Court to compel the Commission to suspend the schedule pending such hearing and decision. The power of suspension of new rates for the limited period authorized under Title 49 USC sec. 316(g) is vested exclusively in the Commission and the Court is without power to review the exercise of its administrative discretion. See *Merchant Truckmen's Bureau of New York* v. *United States*, 16 F. Supp. 998; *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 495; *Board of Railroad Commrs.* v. *Great Northern Ry. Co.*, 281 U.S. 412, 429. The Commission has, as yet, not completed its hearings and has entered no order such as would be subject to review by the Court under Title 28 USC secs. 1336, 2321, 2324, 2325 and Title 49 USCA sec. 305(g).

"The motion for an injunction is denied and the defendants' cross-motion to dismiss the complaint is granted."

The proposed rate is compensatory

The rates proposed by the carriers are not below cost, as suggested by appellant (p. 4 of its jurisdictional statement), but will, on account of the increased weight required, result in increased revenue per car for the railroads (R. A. 134). As pointed out above, there was ample evidence before the Commission that the rate proposed will result in revenues approximately 46% above out-of-pocket cost (R. A. 109, 134, 135).*

* Per car revenues under the $1.74 rate were shown as $1,305 against out-of-pocket cost of $892 (R. A. 109, 135).

In cases where the carriers propose rate reductions, the procedure followed by the Board of Suspension calls for it to secure the views of the Commission's Cost Finding Section as to the compensatory nature of such reductions. Where rates proposed are, in the opinion of the Cost Finding Section, non-compensatory, the Board customarily suspends them. The failure to suspend in this case thus indicates the Cost Finding Section approved the evidence submitted by the railroads showing that the reduced rates were well above cost.

The proposed rate was justified to relieve a rate disadvantage operating against Pacific Coast shippers

Not only were the reduced rates shown to be compensatory, but it was also shown that as a result of general increases in rates in recent years, Pacific Coast shippers of canned goods have been placed at an ever-increasing disadvantage with respect to Midwestern shippers. This growing disadvantage has resulted from the longer distances and higher rates from Pacific Coast points to eastern markets (R. A. 106, 111). For example, evidence was submitted to the Commission showing that rates on canned goods from Pacific Coast points to New York had increased from $1.02 in 1946 to $1.94 immediately prior to the establishment of the rate in question, or an increase of 92 cents per 100 pounds (R. A. 107). The rates from competing canning points in the Midwest have increased during the same period from an average of 65 cents to 93 cents, or an average increase of only 28 cents per 100 pounds. This represents an increase of only 43% from Midwest points as compared with an increase of 90.1% from the Pacific Coast during the same period. (Reply of Canners League of California, et al., filed October 9, 1959.

R. A. 104, et seq.) It is apparent from the figures submitted that the proposed reduction of 20 cents per 100 pounds in consideration of increased loading per car falls far short of restoring the prior rate relationship between Pacific Coast and Midwest shippers. The effort to restore the prior rate relationship accords with the admonitions of the Commission in *Increased Freight Rates 1951*, 281 I.C.C. 557, 637.

Since the proposed rates were shown to be compensatory and to promise greater revenues for the railroads, and as they were shown to be of great importance to Pacific Coast shippers to assist them in holding their Eastern markets against the growing competition of Midwestern producers who had been subjected to substantially lesser freight rate increases, the Commission's decision not to suspend the reduced rates was an informed, deliberative and well-founded exercise of discretion.

The court below was correct in dismissing Luckenbach's antitrust claim

The action of the district court in remanding the issue of alleged violation of the Antitrust laws to the Interstate Commerce Commission for consideration under the doctrine of primary jurisdiction is in accord with *United States* v. *R. C. A.*, 358 U.S. 334, 348 (1959), where this Court said:

> "* * * Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's deli-

cate regulatory scheme, and would throw existing rate structures out of balance."

In addition to throwing rate structures out of balance, if the District Courts throughout the United States were to have authority to upset the Commission's refusal to suspend rates the courts would be flooded with litigation and the calendars clogged with rate cases.

The desire of the court below to seek the observations of the Commission with respect to the extent and scope of the antitrust exemption provided by Section 5(a) of the Interstate Commerce Act* was fully justified since that section is administered by the Commission. Initial resort to an administrative agency is entirely proper where as here any part of the case is within the exclusive jurisdiction of the agency.†

The procedural determination of the district court in electing to dismiss the complaint without prejudice rather than to retain jurisdiction for later consideration followed the procedure approved in *Far East Conference* v. *United States*, 342 U.S. 570, 577 (1952). Such a determination was in all respects proper in the light of the Court's decision on the issues of the case and appellant was in no way prejudiced by such action since it can reinstitute its suit if the Commission should decide adversely to appellant in the rate investigation proceeding now pending.

The decision of this Court in *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282 (1934), answers all of the allegations of the complaint herein.

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* 49 U.S.C.A., Sec. 5b.

† Davis, Administrative Law Treatise, Sec. 19.07, p. 39 (1958)

and we respectfully submit that the Commission's action here should be approved for the reasons stated in that unanimous decision of this Court.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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